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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

JP HYAN, an individual, Plaintiff, v. LIBERTY SURPLUS INSURANCE CORPORATION, a corporation; ROSSLYN (BETH) HUMMER, ESQ., an individual; ERIC C. PETERSON, ESQ., an individual; and RUTTER HOBBS & DAVIDOFF INCORPORATED, a corporation, Defendants.	CASE NO. 2:14-CV-02004 GAF (FFMx) Honorable Gary A. Feess **PLAINTIFF'S OPPOSITION TO DEFENDANT ROSSLYN STEVENS HUMMER'S MOTION TO STRIKE PLAINTIFF'S FIRST AMENDED COMPLAINT AS A SLAPP SUIT** Hearing Date: June 23, 2014 Time: 9:30 a.m. Courtroom: 740

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

COMES NOW, Plaintiff JP Hyan, by and through his attorneys of record, Howarth & Smith, and hereby opposes Defendant Rosslyn (Beth) Hummer's Strike the First Amended Complaint as a SLAPP Suit. This opposition is based on the Memorandum of Points and Authorities, all prior pleadings and papers previously on file with this Court, and such further oral and documentary evidence which may be presented at the hearing on this motion and opposition.

Dated: June 2, 2014

Respectfully Submitted,

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By: /s/ Suzelle M. Smith
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Rosslyn (Beth) Hummer ("Hummer") brings a motion to strike the claims brought by Plaintiff JP Hyan ("Hyan") in his First Amended Complaint ("Hummer Motion to Strike") on the basis that Mr. Hyan's First Amended Complaint is a "Strategic Lawsuit Against Public Participation" or "SLAPP" intended to chill Ms. Hummer's first amendment rights.[1]

California law provides that a party who makes statements intended to and which in fact do induce a breach of contract is liable for the damage done from this unlawful conduct. *See* Judicial Council of California Civil Jury Instruction 2200; *see also Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118 (1990). Ms. Hummer argues that the conduct complained of in the First Amended Complaint, which otherwise would constitute inducing breach of contract under California law, is protected by the litigation privilege and the Anti-SLAPP statute because what is alleged is that she "told" Liberty and RHD to take actions which breached their contracts. *See* Hummer Motion to Strike at 2-12.

Hummer claims that if the inducement of a breach of contract is done by "speaking" or communicating, and the motive for the conduct is stimulated by some other litigation exposure, then the litigation privilege and the anti-SLAPP statute prevents the claims. *See* Hummer Motion to Strike at 12-16. Of course, Hummer is wrong and she cites no authority which holds that inducing breach of contract by telling another to breach the contract is protected from liability by the First Amendment or the anti-SLAPP statute. She also cites no authority that her motive for inducing breach of contract, namely that she wants all the coverage from Liberty

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[1] For a full recitation of the pertinent facts at issue on this Motion to Dismiss, *see* Plaintiff's Opposition to Liberty Surplus Insurance Company's Motion to Dismiss Plaintiff's Amended Complaint Pursuant to FRCP 23(b)(6) at Section I, incorporated herein by reference.

for herself and none for Hyan, invokes the litigation privilege of Cal. Civil Code Section 47.

Rather than provide any legal authority for her heroic claims that Cal. Civil Code Section 47 and Cal. Civ. Proc. Code § 425.16 have eliminated liability for an inducing breach of contract cause of action, Hummer spends 10 pages wrongly characterizing the facts alleged in the First Amended Complaint and ignoring the key allegations of the First Amended Complaint which have nothing to do with protected conduct or communications under Cal. Civil Code Section 47 and Cal. Civ. Proc. Code § 425.16. Whatever justification Ms. Hummer may have for her claims against Liberty or anyone else, what she cannot do is direct the insurance carrier for RHD, Liberty, not to pay Mr. Hyan's Judgment. This is not conduct which comes under the litigation privilege and is not conduct which is protected by the anti-SLAPP statute.

Ms. Hummer argues that anything she says, including directing a party to an insurance contract not to pay a legitimate claim, while insisting that the carrier deplete the policy due to payments for her benefit, is "speech" protected by the First Amendment and/or "litigation" related. *See* Hummer Motion to Strike at 12-16. Ms. Hummer's argument would eviscerate the cause of action for inducing breach of contract totally. Under her version of the statutes, anything spoken is non-actionable and if the defendant claims that someone could sue or has sued based on her statements, then the Anti-SLAPP statute prevents liability. *Id.* This is not the law. Neither the litigation privilege nor the Anti-SLAPP statute apply to the conduct and statements alleged against Hummer. *Wang v. Wal-Mart Real Estate Business Trust*, 153 Cal. App. 4th 790 (2007).

Liberty also brought a Motion to Dismiss the claims in the First Amended Complaint as to it, claiming that there is no direct right of action by Mr. Hyan or right to a declaratory relief action ("Opposition to Liberty's Motion to Dismiss"). Mr. Hyan incorporates by reference his Opposition to Liberty's Motion to Dismiss, as it deals with the same asserted legal arguments raised by Hummer in part. Ms.

Hummer has also brought a Motion to Dismiss the First Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) ("Hummer Motion to Dismiss"). Mr. Hyan incorporates by reference his Opposition to Hummer's Motion to Dismiss, as it deals with the same asserted legal arguments raised by Ms. Hummer in this motion.

II. LEGAL STANDARD ON AN ANTI-SLAPP MOTION

The California anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16, provides the requirements for asserting an anti-SLAPP claim:

> Section 425.16 articulates a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold prima facie showing that the defendant's acts, of which the plaintiff complains, were ones taken in furtherance of the defendant's constitutional rights of petition or free speech in connection with a public issue. If the court finds that such a showing has been made, then the plaintiff will be required to demonstrate that there is a probability that the plaintiff will prevail on the claim. The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue. Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.

Governor Gray Davis Com. v. Am. Taxpayers Alliance, 102 Cal. App. 4th 449, 456 (2002). The burden is first on the defendant to show that the claim is a SLAPP. If the defendant succeeds on that burden, the plaintiff must demonstrate a probability that he will prevail on the claim. *Id.* "We look at the pleadings and declarations, accepting as true the evidence that favors the plaintiff and evaluating the defendant's evidence 'only to determine if it has defeated that submitted by the plaintiff as a matter of law.' The plaintiff's cause of action needs to have only ''minimal merit' to survive an anti-SLAPP motion." *Cole v. Patricia A. Meyer & Associates, APC*, 206 Cal. App. 4th 1095, 1105 (2012) (quoting *Soukup v. Law Offices of Herbert Hafif*, 39 Cal. 4th 260 (2006).

III. MR. HYAN'S FIRST AMENDED COMPLAINT IS NOT A SLAPP AND IS NOT SUBJECT TO THE LITIGATION PRIVILEGE

In support of her argument that Mr. Hyan's First Amended Complaint is a SLAPP claim, Ms. Hummer asserts approximately 10 pages of "facts," and then summarily declares that she has established a prima facie case demonstrating that Mr. Hyan's claim is a SLAPP. *See* Hummer Motion to Strike at 2-12. Obviously, Mr. Hyan disputes many of the "facts" alleged by Ms. Hummer in support of her argument and the inferences taken from them. Ms. Hummer also significantly misstates the allegations made by Mr. Hyan in the First Amended Complaint. But the First Amended Complaint states what it is that Hummer did which is actionable, allegations that Hummer ignores and asks the Court to ignore.

Under Cal. Civ. Proc. Code § 425.16, Ms. Hummer has the burden to show that the conduct which forms the basis of Mr. Hyan's complaint is protected. She cites no authority in support of her proposition that words which themselves breach a contract or induce another to breach its contract are not ever actionable due to Anti-SLAPP or Cal. Civil Code Section 47.[2] There is no such authority because it is not the law.

For example, in *Wang v. Wal-Mart Real Estate Business Trust*, 153 Cal. App. 4th 790 (2007), plaintiffs brought an action for breach of contract and fraud against numerous defendants, including Wal–Mart Stores Inc. and the City of San Bernardino based on a dispute stemming from the sale of two parcels of plaintiffs' real property to Wal–Mart. Plaintiffs there alleged their remaining adjoining parcels of property were wrongfully deprived of street access through the actions of these defendants in planning and developing a Wal–Mart store. Wal–Mart and the City brought a special motion to strike the complaint pursuant to the anti-SLAPP statute, which the trial court granted, concluding that all of plaintiffs' allegations arose from protected governmental petitioning activity of the planning and permitting process.

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[2] Hummer in her motion conflates the litigation privilege and the anti-SLAPP statute. However, under established California law, the applicability of the litigation privilege is also irrelevant to determining whether Hyan's FAC falls within the ambit of the anti-SLAPP statute. If the litigation privilege is applicable to a cause of action, which it clearly is not here, it would only be considered under the "likelihood of success on the merits" prong of the anti-SLAPP statute only if the activity forming the gravamen of the claim is protected under the first prong of the anti-SLAPP statute. *See Chodos v. Cole*, 210 Cal.App.4th 692 (2012), as modified, rehearing denied, review denied; *See also City of Costa Mesa v. D'Alessio Investments, LLC*, 214 Cal. App. 4th 358 (2013), rehearing denied, review filed.

The Court of Appeals reversed the trial court, holding that the allegations of plaintiffs' complaint were contract and fraud claims that were only incidentally related to the speech and petition rights of the permitting process:

> To decide whether the Wangs' allegations are based essentially on protected activity, or alternatively refer to petitioning activity that is only incidental or collateral to the main thrust of the complaint, we evaluate the record of this complex business transaction that involved both private agreements and representations among the parties, along with essential applications for governmental permits to proceed with the development. We look to whether the defendants' acts underlying the plaintiffs' causes of action were themselves acts carried out "in furtherance of the right of petition or free speech." (*City of Cotati, supra,* 29 Cal.4th 69, 78, 124 Cal.Rptr.2d 519, 52 P.3d 695.)
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> . . .
>
> For purposes of interpreting section 425.16, subdivision (e)(2), our focus should be upon the moving parties' activities that were carried out in the course of satisfying the conditions of the contract and performing it, which activities included Wal–Mart's business practices as a developer in obtaining the necessary governmental permission to build the shopping center. As in

> *Kajima Engineering, supra,* 95 Cal.App.4th 921, 929, 116 Cal.Rptr.2d 187, those business-related activities are described in the complaint as giving rise to recognized tort claims, because of the manner in which Wal–Mart allegedly sought to secure and implement plans for its construction project, allegedly to the detriment of the Wangs. Such alleged improper conduct does not arise from the defendants' petitioning activities in pursuing the permits, but rather from its conduct in carrying out its contractual duties, seeking to extend escrow, requesting the execution of documents, and other practices within the scope of the parties' contractual relationship. (*Id.* at p. 930, 116 Cal.Rptr.2d 187.)
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> . . .
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> Here, as in *Scott, supra,* 115 Cal.App.4th 404, 9 Cal.Rptr.3d 242 and in *Gallimore, supra,* 102 Cal.App.4th 1388, 126 Cal.Rptr.2d 560, we cannot say as a matter of law that these plaintiffs are relying solely or principally upon protected communications for stating their claims. Instead, the Wangs should be able to plead *wrongful acts* by the defendants, and then attempt to prove them with *evidence* about alleged misconduct that occurred behind the scenes, during the period of escrow, that was not primarily directed toward and did not exclusively constitute any communicative acts to a public agency, during the permitting process. By analogy, this complaint can be viewed as alleging these defendants were developing a product, and in the process, committed unprotected tortious acts or breaches of contract. (*Scott, supra,* at pp. 417–418, 9 Cal.Rptr.3d 242.) We seek to construe the statute to implement the proper purposes and

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> to avoid an anomalous result. (*Ludwig, supra,* 37 Cal.App.4th at pp. 17–18, 43 Cal.Rptr.2d 350.)
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> We believe that a fair reading of the allegations about the acts underlying the plaintiffs' causes of action leads to a conclusion that plaintiffs are relying on acts that Wal–Mart carried out in furtherance of its economic interests in implementing the contractual agreement, in order to utilize the property that was still in escrow, with the Wangs as nominal owners or titleholders.
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> . . .
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> With respect to both Wal–Mart and the City, we conclude the Wangs' causes of action raised only collateral or incidental facts with respect to any conduct falling within the applicable definition in the anti-SLAPP statutory scheme ("any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law"; § 425.16, subd. (e)(2)). The trial court erroneously granted the motion under the first prong of the analysis.

Wang v. Wal-Mart Real Estate Business Trust, 153 Cal. App. 4th at 807-10.[3]

[3] The litigation privilege and the anti-SLAPP statute are analyzed under a similar test. "The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to, the action, i.e., that it not be extraneous to the action. A good example of an application of the principle is found in the cases holding that a statement made in a judicial proceeding is not privileged unless it has some reasonable relevancy to the subject matter of the action. The 'furtherance' requirement was never intended as a test of a participant's motives, morals, ethics or intent." *Silberg v. Anderson*, 50 Cal. 3d 205, 219-20 (1990) (citations omitted).

> A party's legitimate objectives *in* the litigation are limited to the remedies which can be awarded by courts. Thus, the "objects of the litigation" for a plaintiff are to obtain a monetary recovery for damages or other relief; a defendant's "objects" are to resist a

Similarly in *Renewable Resources Coalition, Inc. v. Pebble Mines Corporation*, 218 Cal. App. 4th 384 (2013) plaintiff appealed an order granting a motion to strike claims for inducing breach of contract under Cal. Civ. Proc. Code § 425.16 and Cal. Civ. Code § 47 where defendants obtained confidential documents from plaintiff and used them to prosecute a complaint against plaintiff before the Alaska Public Offices Commission for alleged election law violations. The appellate court there held that the gravamen of plaintiff's claims, as here, was not constitutionally protected activity, but the act of inducing a breach of a separate contract:

> The Pebble defendants' attempts to bring their conduct within the ambit of the anti-SLAPP statute are unavailing. Although the Pebble defendants rely on their bringing the APOC complaint as protected activity for SLAPP purposes, the Coalition did not sue the Pebble defendants for having prosecuted the APOC complaint. Rather, as discussed, the pleadings establish the gravamen of the Coalition's claim against the Pebble defendants is that they induced Kaplan to sell them the Coalition's confidential documents for $50,000.
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> Specifically, the first amended complaint alleges at paragraph 47: "Notwithstanding knowledge of [the] agreement

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> determination of liability and whatever assessment of damages, penalty or other order that the plaintiff seeks. Thus, either party's understandable desire (or motive) for vindication—particularly where such vindication is sought outside of the litigation context—is not an "object of litigation," which satisfies the "furtherance" requirement.
>
> Stated another way, if *Silberg's* "furtherance" test is to serve its purpose, the test can be satisfied only by communications which function intrinsically, and apart from any consideration of the speaker's intent, to advance a litigant's case.

Rothman v. Jackson, 49 Cal. App. 4th 1134, 1147-48 (1996) (holding that statements to the press related to the litigation were not subject to the litigation privilege). Mr. Hyan addresses Ms. Hummer's anti-SLAPP and litigation privilege arguments together herein.

> [between FRI and the Coalition], and knowledge that such documents were confidential under the agreement, [the Jermain firm] induced FRI to breach its contract with [the Coalition], and to breach the implied covenant of good faith and fair dealing implied into that contract, *by offering and then paying $50,000 to FRI in exchange for (i) FRI's delivery of all of the confidential communications between its principal Robert Kaplan and the principals of [the Coalition],....*" (Italics added.)
>
> A fair reading of the Coalition's complaint is that the Pebble defendants were being sued for wrongfully purchasing the Coalition's confidential documents from Kaplan, not for prosecuting the APOC complaint. The Pebble defendants' purchase of the Coalition's confidential documents from Kaplan does not amount to an exercise of the constitutionally protected rights of petition or free speech. Given the nature of the Coalition's claims against the Pebble defendants, the claims were not subject to a special motion to strike under section 425.16. Therefore, the grant of the special motion to strike was error.

Renewable Resources, 218 Cal. App. 4th at 397-98.

And in *Copenbarger v. Morris Cerullo World Evangelism*, 215 Cal. App. 4th 1237 (2013), the appellate court again reversed a trial court granting of a motion to strike under anti-SLAPP claims for interference with contractual relations. In that case, a lessor agreed not to declare a default under a sublease on account of then existing defaults so long as the sublessee made agreed-upon payments. The complaint alleged that defendant caused lessor to breach that agreement by declaring a default under the Sublease and terminating it and that a default notice was served on plaintiff. Plaintiff filed a complaint alleging, among other things, intentional

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interference with contract. The trial court there granted defendants' motion to strike under the anti-SLAPP statute. Reversing the trial court, the appellate court stated:

> Respondents also did not meet their threshold burden of demonstrating the third cause of action, for intentional interference with contract, arose out of protected activity. The third cause of action alleged Artz, D'Alessio, and VMG intentionally interfered with the Sublease by inducing Cerullo to seek to terminate it. The third cause of action was not brought against Cerullo, the party for which the 30–day notice and the three-day notice were served. The acts giving rise to the third cause of action were not service of the three-day notice, but the alleged conduct of Artz, D'Alessio, and VMG in inducing Cerullo to serve the notice and attempt to terminate the Sublease.

Copenbarger, 215 Cal. App. 4th at 1248; *see also Bailey v. Brewer*, 197 Cal. App. 4th 781 (2011) (holding anti-SLAPP not applicable in case where plaintiff brought causes of action in his complaint for interference with contractual relationship based on defendant sending a cease and desist letter with false allegations); *Mann v. Quality Old Time Service, Inc.*, 120 Cal. App. 4th 90 (2004) (holding anti-SLAPP not applicable as to plaintiff's cause of action for interference with contractual relationship arising from competitor's making disparaging remarks to corporation's customers and falsely reporting corporation's illegal acts to interested governmental agencies); *see also ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993 (2001) (publicly-traded company brought nine causes of action, including for interference with contractual relations, against owners of businesses with which company had at one time considered a merger, based in part on disparaging comments against company that business owners posted on Internet and a complaint that they filed with Securities and Exchange Commission (SEC) alleging possible improprieties by company. The Court of Appeal held that claims for fraud, negligent misrepresentation, negligence, and interference with contractual relations were not subject to anti-SLAPP motion); *see also Haneline Pacific Properties, LLC v. May*, 167 Cal. App. 4th 311 (2008) (Purchaser of 50 percent interest in land brought action against co-owner who allegedly discouraged sale of the interest to purchaser, alleging interference with contract. The trial court there granted defendant's motion to strike the suit as strategic lawsuit against public participation (SLAPP). The appellate court reversed, holding that communications discouraging proposed sale of 50 percent interest were not within litigation privilege.).

Ms. Hummer cannot fit her conduct, as it is alleged in the FAC and which has legally actionable consequences, into the protections of Cal. Civ. Code Section 47 or the anti-SLAPP legislation. Therefore, she focuses on background allegations in the First Amended Complaint which explain the context of her interference with the Liberty contract and the Settlement Agreement. She claims that since the First Amended Complaint refers to the fact that there have been malpractice cases filed against Ms. Hummer and RHD, this activates the litigation privilege and the anti-SLAPP statute, preventing any litigation based on conduct and statements which themselves constitute breach of contract or inducement of breach of contract. Hummer Motion to Strike at 12-16. Of course, there are malpractice claims. The Liberty insurance was purchased for malpractice coverage. But neither Cal. Civil Code § 47 not the anti-SLAPP statute preclude liability for speech and conduct even in court which amounts to malpractice. *See Mattco Forge, Inc. v. Arthur Young & Co.*, 5 Cal. App. 4th 392 (1992); *Kolar v. Donahue, McIntosh & Hammerton*, 145 Cal. App. 4th 1532 (2006); *Hylton v. Frank E. Rogozienski, Inc.*, 177 Cal. App. 4th 1264 (2009).

Additionally, the First Amended Complaint's description of the incentive for Hummer to cause RHD and Liberty to breach their contracts does not render the FAC subject to motion to strike or dismissal. As the court stated in *People ex rel. Fire Ins. Exch. v. Anapol*, 211 Cal. App. 4th 809 (2012):

> Moreover, courts must be careful to distinguish allegations of conduct on which liability is to be based from allegations of motives for such conduct. "[C]auses of action do not arise from motives; they arise from acts." (*Wallace v. McCubbin, supra,* 196 Cal.App.4th at p. 1186, 128 Cal.Rptr.3d 205.) "The statute applies to claims 'based on' or 'arising from' statements or writings made in connection with protected speech or petitioning activities, regardless of any motive the defendant may have had in undertaking its activities, or the motive the plaintiff may be ascribing to the defendant's activities." (*Tuszynska v. Cunningham, supra,* 199 Cal.App.4th at p. 269, 131 Cal.Rptr.3d 63.) Similarly, a court ruling on an anti-SLAPP motion must distinguish between allegedly wrongful acts and evidence of those acts. "Where the defendant's protected activity will only be used as evidence in the plaintiff's case, and none of the claims are based on it, the protected activity is only incidental to the claims," and will therefore not support an anti-SLAPP motion. (*Coretronic Corp. v. Cozen O'Connor, supra,* 192 Cal.App.4th at pp. 1388–1389, 121 Cal.Rptr.3d 254.)

Id. at 823; *see also Graffiti Protective Coatings, Inc. v. City of Pico Rivera*, 181 Cal. App. 4th 1207, 1214-15 (2010) ("the Court must distinguish between (1) speech or petitioning activity that is mere *evidence* related to liability and (2) liability that is *based on* speech or petitioning activity. Prelitigation communications or prior litigation may provide evidentiary support for the complaint .").

The FAC alleges that Hummer directed Liberty not to pay Mr. Hyan any of the proceeds of the Liberty Policy, when she knew that his claim and Judgment are covered under the Liberty policy. *See* First Amended Complaint at ¶¶ 73, 102, 103, 105. It is also alleged that Hummer's conduct intended and did cause RHD not to use its best efforts to do, what she told Liberty not to do, namely, pay Mr. Hyan. *See* First Amended Complaint at ¶¶ 96-107. This conduct is not protected and is actionable. *See Wang*, 153 Cal. App. 4th 790.

Ms. Hummer asserts that her conduct and statements which have the legal significance of inducing the breach of contract, are protected, even though unlawful, because she had a reason to do this – namely that she was being sued and wanted her own insurance coverage. *See generally*, Hummer Motion to Strike at 2-12. Essentially, Ms. Hummer argues that the *motive* behind her action was the defense of litigation against her. That is not the proper basis for an anti-SLAPP claim. Ms. Hummer's reasons for directing Liberty not to pay Mr. Hyan could be varied and based on a number of possible motives. But Ms. Hummer's motive for inducing the breach of contract do not defeat the claim. *See* Judicial Council of California Civil Jury Instruction 2200; *see also Pacific Gas*, 50 Cal. 3d 1118.[4]

IV. MR. HYAN CAN DEMONSTRATE A PROBABILITY OF SUCCESS ON HIS CLAIM

A. Mr. Hyan Can Establish a Prima Facie Case on the Fourth and Eighth Causes of Action

Even if Mr. Hyan's claims are subject to the anti-SLAPP statute, the Court should deny Ms. Hummer's Motion to Strike because Mr. Hyan can demonstrate a probability of success on the merits of his claim.

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[4] Ms. Hummer's argument as to the Noerr-Pennington doctrine fails for the same reason. Ms. Hummer argues that the "Noerr-Pennington Doctrine provides immunity for their communications to those who petition the government, including through the initiation of a lawsuit." Hummer Motion to Strike at 15, citing *Sosa v. DirecTV, Inc.*, 437 F.3d 923 (9th Cir. 2006). The Noerr-Pennington doctrine operates "to shield good faith litigants from tort liability for bringing a lawsuit. This doctrine relies on the constitutional right to petition for redress of grievances to establish that there is no antitrust liability for petitioning any branch of government, even if the motive is anticompetitive." *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1133 (1990); *see also Sosa,* 437 F.3d at 929 ("Under the *Noerr–Pennington* doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct."). The conduct of Ms. Hummer, as alleged in the First Amended Complaint, is not based on the litigation against Ms. Hummer. At best, the litigation was simply the motive behind Ms. Hummer's wrongful actions. The Noerr-Pennington doctrine therefore does not apply.

All that a plaintiff is required to show at this stage is a prima facie showing of facts to sustain his claim.

> [T]he plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. We consider the pleadings, and supporting and opposing affidavits upon which the liability or defense is based. However, we neither weigh credibility, nor compare the weight of the evidence. Rather, we accept as true the evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law. If the plaintiff can show a probability of prevailing on *any part of its claim,* the cause of action is not meritless and will not be stricken; once a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff *has established* that its cause of action has some merit and the entire cause of action stands.

Oasis W. Realty, LLC v. Goldman, 51 Cal. 4th 811, 820 (2011) (citations omitted).

The claims against Ms. Hummer are for inducing breach of contract.[5] The elements of such a claim are: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Pacific Gas &*

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[5] Mr. Hyan's declaratory relief claim, the Fifth Cause of Action, results from his other substantive claims and will be upheld if the other claims are upheld. *See* Opposition to Hummer Motion to Dismiss at Section VI, which is incorporated herein by reference.

Electric Co. v. Bear Stearns & Co. 50 Cal.3d 1118, 1126 (1990) (internal citations omitted.).

The essential facts of Mr. Hyan's complaint are essentially undisputed. The Fourth Cause of Action addresses Mr. Hyan's claim that Ms. Hummer interfered with Liberty's performance of its insurance contract. *See* First Amended Complaint at ¶¶ 66-77. Mr. Hyan has a valid judgment against RHD, Liberty's insured. *See* Minute Order, dated September 12, 2012, Exhibit 1 to Hummer Declaration ("Order") at 4. RHD holds a valid contract with Liberty to provide it insurance coverage in just such a situation. *Id.* at 1. Ms. Hummer is aware of that contract. *See* Declaration of Laurence L. Hummer in Support of Defendant Rosslyn Stevens Hummer's Notice of Motion and Motion to Strike Plaintiff's Complaint as a SLAPP Suit ("Hummer Declaration") at ¶ 9 ("I tendered the claim for defense both to Liberty Mutual and to Mr. Davidoff at Rutter Hobbs & Davidoff on February 8, 2010"). Ms. Hummer has objected to the payment of the Liberty funds to Mr. Hyan. *See* Hummer Declaration at ¶ 18; *see also* Exhibit 11 to Hummer Declaration at 2 ("we object to any settlement in the Hyan matter that would exhaust Ms. Hummer's insurance"). Mr. Hyan has not collected any money from Liberty in satisfaction of his judgment. *See* Order at 6. As a result, Mr. Hyan has gone more than two years from the date of his judgment without a payment. *See* Final Judgment, Exhibit C to First Amended Complaint. Thus, the facts underlying the Fourth Cause of Action are largely undisputed.

The Eight Cause of Action addresses Mr. Hyan's claim that Ms. Hummer induced RHD to breach its Settlement Agreement with Mr. Hyan. There is a valid contract between Mr. Hyan and RHD, which obligates RHD to use its "best efforts" to obtain the Liberty policy for Mr. Hyan. *See* RHD Answer to First Amended Complaint at ¶ 97 (ECF Dkt. No. 26) ("Defendant admits that the settlement agreement between Hyan and RHD is a valid and enforceable contract."). Ms. Hummer is aware of the contract. *See* Hummer Declaration at ¶ 26. Ms. Hummer has objected to the payment of the Liberty funds to Mr. Hyan. *See* Hummer Declaration at ¶ 18; *see also* Exhibit 11 to Hummer Declaration at 2 ("we object to any settlement in the Hyan matter that would exhaust Ms. Hummer's insurance"). RHD has been unable to obtain the Liberty policy for Mr. Hyan. *See* Order at 6. RHD has abandoned its efforts to obtain the policy for Mr. Hyan. *See Executive Risk Specialty Insurance Co. v. Rutter Hobbs & Davidoff*, No. 12-56862 (9th Cir. Mar. 19, 2014) (Waterford, J., dissenting). As a result, Mr. Hyan has gone more than two years from the date of his judgment without a payment. *See* Final Judgment, Exhibit C to First Amended Complaint. Thus, the facts underlying the Eighth Cause of Action are largely undisputed. Mr. Hyan has therefore established a prima facie case on his claims, and has met his burden under the anti-SLAPP statute.

B. Mr. Hyan's Claims are not Barred by the Attorney-Client Privilege

Ms. Hummer argues that she, her attorney, and Liberty have a "common interest and share in a tripartite attorney-client communication privilege." Hummer Motion to Strike (citing *Bank of America v. Superior Court*, 212 Cal. App. 4th 1076 (2013)). Ms. Hummer does not specify which communications are allegedly subject to the privilege. However, she has already submitted evidence supporting Mr. Hyan's claims, herself waiving the claim of privilege.

A party may claim attorney-client privilege as an objection to some evidence that the other party puts forth. *See* Cal. Evid. Code § 954. However, if that party voluntarily submits the subject communication, he waives the privilege. The privilege is "waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone." Cal. Evid. Code § 912(a). Waiver occurs where disclosure is made to "strangers to the attorney-client consultation" or to persons who "possess interests adverse to the client." *Ins. Co. of N. Am. v. Superior Court,* 108 Cal. App. 3d 758, 766 (1980).

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Thus, Ms. Hummer has waived any such attorney-client privilege by voluntarily submitting the relevant communications as evidence in this action. In her Motion, she states: "Ms. Hummer's defense counsel wrote a letter the next day [June 3, 2011] to Liberty, Rutter Hobbs & Davidoff's and ERSIC's (Chubb's) attorneys, objecting to a settlement that would exhaust the policies and leave Ms. Hummer uninsured, and reminding Mr. Davidoff of the law firm's indemnity obligations regarding its former employee." Hummer Motion to Strike at 10. In evidence of that statement, Ms. Hummer's lawyer submits a declaration in which he states that he received a letter from Mr. Mitch Mulbarger dated June 3, 2011, and attaches that letter as Exhibit 11 to his declaration. *See* Declaration at ¶ 18. That letter, sent on Ms. Hummer's behalf, states "we object to any settlement in the Hyan matter that would exhaust Ms. Hummer's insurance . . ." By submitting this letter in support of her Motion to Strike, Ms. Hummer has waived the attorney client privilege as to this letter. *See Julrik Productions, Inc. v. Chester*, 38 Cal. App. 3d 807, 810–11 (1974) ("After Tarloff and defendant had orally agreed on the modification, Tarloff wrote, in August 1963, to his attorney in Los Angeles, giving the latter the details of the modification agreed on. At the trial, Tarloff testified to sending that letter and [to the fact that] it contained that information. Defendant sought to see and examine the letter itself . . . . We think [the privilege] was waived here when Tarloff, without objection, testified under cross-examination not only that there was such a letter but went into some detail as to its contents."); *see also Agnew v. Superior Court In and For Los Angeles County*, 156 Cal. App. 2d 838, 842 (1958) ("Where a client voluntarily testifies as a witness to confidential communications made by him to his attorney he thereby waives the privileged character of such communications and both he and his attorney may then be fully examined in relation thereto."). There is therefore already admissible evidence of Ms. Hummer's communications in which she objected to the payment of funds to Mr. Hyan at issue in this case.

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C. Ms. Hummer Can Be Held Liable for Inducing Breach of Contract

Ms. Hummer argues that the claims of inducing breach of contract are legally barred because she is "an insured under the Liberty contract of insurance, and cannot be sued for interfering with her own contract. And, Mr. Hyan is not a party to the contract." Hummer Motion to Strike at 17. Mr. Hyan addresses these arguments in his Opposition to Hummer's Motion to Dismiss at Sections IV and VI, which is incorporated herein by reference.

D. Mr. Hyan is not Collaterally Estopped from Asserting his Claims Under Section 11580

Lastly, Ms. Hummer claims that "Mr. Hyan is Collaterally Estopped to Argue That He Is a Beneficiary Under the Liberty Policy." Hummer Motion to Strike at 17. Mr. Hyan addresses these arguments in his Opposition to Hummer's Motion to Dismiss at Sections V, which is incorporated herein by reference.

Because Mr. Hyan can establish a probability that he will succeed on the merits of his claim, the Court should deny Ms. Hummer's Motion to Strike.

VI. MS. HUMMER CANNOT CLAIM ATTORNEY'S FEES AND COSTS

Ms. Hummer claims that she is entitled to recover attorney's fees and costs on her Motion to Strike. *See* Hummer Motion to Strike at 20. However, pursuant to the anti-SLAPP statute, only a "prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." Cal. Civ. Proc. Code § 425.16(c)(1). Because Ms. Hummer's anti-SLAPP motion fails, she should not be awarded attorney's fees or costs.

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VII. CONCLUSION

For the foregoing reasons, Plaintiff JP Hyan respectfully requests that this Court deny Ms. Hummer's Motion to Strike the First Amended Complaint.

Dated: June 2, 2014

Respectfully Submitted,

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